

**UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT**

**NOTICE OF STANDING ORDER 03-01
AND PROPOSED NEW LOCAL RULE 22(a)**

PLEASE TAKE NOTICE that the Court has today entered the attached Standing Order 03-01 regarding applications for certificates of appealability. The Standing Order and commentary supersede existing Local Rule 22(a) and will become new Local Rule 22(a), subject to any comments received and the Court's experience under the Standing Order.

New Local Rule 22(a) will take effect on July 8, 2003, subject to any revision. Interested parties may submit comments on or before July 8, 2003, to:

Patricia S. Connor, Clerk
United States Court of Appeals for the Fourth Circuit
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

/s/ Patricia S. Connor
Patricia S. Connor
Clerk

May 9, 2003
Date

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

In the Matter of	*	
Certificates of Appealability	*	Annotated Standing Order 03-01
Under Fourth Circuit Rule 22(a)	*	

ORDER

(1) The following procedures apply in cases in which the district court has not granted a certificate of appealability (“certificate”):

(A) The appellant may submit a request for a certificate with the Court of Appeals specifying the issues on which the appellant seeks authorization to appeal and giving a statement of the reasons why a certificate should be issued. The request shall be submitted either in the form prescribed by Fed. R. App. P. 27(a) for motions or on a form provided by the clerk. The clerk shall refer the request and other relevant materials to a three-judge panel. If the panel denies a certificate, the appeal will be dismissed. If the panel grants a certificate, the clerk shall enter a briefing order specifying the issues the court will review.

NOTE: Subsection (1)(A) allows an appellant to request a certificate before a briefing order is entered. With respect to the form of the request, the proposed rule largely tracks existing Fourth Circuit Rule 22(a).

Because briefing orders are entered promptly after the appeal is docketed, this subsection is likely to affect relatively few appellants. However, when an appellant does file a request before a briefing order is entered, the most efficient course for the court is to consider that request without waiting for a brief.

(B) If no express request for a certificate has been filed pursuant to Subsection (1)(A) of this Rule, the notice of appeal will be treated as a request for a certificate. See Fed. R. App. P. 22(b)(2). To assist the court in resolving this request, the clerk shall enter a Preliminary Briefing Order directing the appellant to file a brief on the merits and, if required by applicable rules, an appendix. The Preliminary Briefing Order shall neither require nor authorize a brief from the appellee, nor shall it make any statement regarding a reply brief by the appellant, but in all other respects it shall be substantially identical to a standard briefing order entered pursuant to Local Rule 31(b) or Local Rule 34(b), as appropriate. The clerk shall refer the appellant's brief and other relevant materials to a three-judge panel for a determination of whether the appellant has made a substantial showing of the denial of a constitutional right as to any claim presented in the brief. If the panel denies a certificate, the appeal will be dismissed. If the panel grants a certificate, the clerk shall enter a Final Briefing Order stating that a certificate has been granted and directing the appellee to file a brief addressing the issue or issues that the court has accepted for review, and providing for the filing of a reply brief by the appellant.

NOTE: Subsection (1)(B) sets forth the procedures that are likely to be followed in most cases. Under these procedures, the court, having not received any request for a certificate, will direct the appellant to file a brief on the merits. Although not expressly stated in the proposed rule, the appellant may also file a separate request for a certificate along with his brief; this ensures that the appellant will not be prevented from making arguments relating to the certificate that are separate from the arguments on the merits. Regardless of whether a separate request is filed, the court will look at the brief but will not use it to make a final decision; instead, as stated in this section, the court will only determine whether the appellant has made the showing required by 28 U.S.C. § 2253(c)(2). If a

certificate is granted, the court will enter an order directing the appellee to file a brief addressing the issues the court has accepted for review.

(2) The following procedures apply in cases in which the district court has granted a certificate of appealability as to at least one issue:

(A) The appellant may submit a request for a certificate as to additional issues, along with a statement of the reasons why the expanded certificate should be issued. The request shall be submitted either in the form prescribed by Fed. R. App. P. 27(a) for motions or on a form provided by the clerk. The clerk shall refer the request and other relevant materials to a three-judge panel. After the panel has granted or denied such a request, the clerk shall enter a briefing order directing the parties to file briefs addressing the issues the court will review.

NOTE: Section (2) of this proposed rule parallels Section (1). Just as Section (1) prescribes separate procedures depending on whether the appellant files a request for a certificate before a briefing order is entered, Section (2) makes different provisions depending on whether a request to expand the certificate is filed before a briefing order is entered.

Subsection (2)(A) addresses the situation in which the request is filed, and provides that the request will be considered before the court enters its briefing order. In both language and effect, this section is substantially identical to subsection (1)(A) of the proposed rule.

(B) If no express request to expand the certificate has been filed pursuant to Subsection (2)(A) of this Rule, the clerk shall enter a briefing order directing the parties to file briefs addressing the issues certified for review by the district court. If the appellant's brief on the merits addresses issues beyond the scope of the certificate granted by the district court, this court will not review those additional issues unless the appellant

files, simultaneously with the brief on the merits, a statement containing the names of the parties, the case number, and a list of the issues that the appellant wishes to add to the certificate. Such statement may also, but need not, present reasons why the certificate should be expanded. Upon receipt of the statement, the clerk shall suspend briefing and refer the brief, the statement, and other relevant materials to a three-judge panel. Once the panel has determined whether to expand the certificate, the clerk shall enter a Final Briefing Order specifying the issue or issues the court will review.

NOTE: Subsection (2)(A) governs the situation in which the district court grants a certificate as to some issues and the appellant wishes to raise additional issues but does not request expansion of the certificate before a briefing order is entered. Under this subsection, the appellant must brief all the issues he wishes to raise and then file a separate statement identifying the issues he has addressed that were not certified by the district court. If the appellant does not file an appropriate statement, the court will not review any issues beyond the scope of the certificate granted by the district court. Cf. Valerio v. Crawford, 306 F.3d 742, 764-65 (9th Cir. 2002) (en banc) (discussing circuit rule barring expansion of certificate absent express request). When, however, the appellant files a proper statement, the court will suspend briefing and decide whether to expand the certificate before requiring the appellee to file its brief; this process parallels the process for granting a certificate ab initio, as described in subsection (1)(B).

The purpose of the statement described in subsection (2)(A) is to trigger the pause in the briefing process during which the court will consider whether to expand the certificate. This pause will assist the court in complying with Miller-El v. Cockrell, 123 S. Ct. 1029 (2003), by ensuring a separation between the certification inquiry and the final inquiry into the merits.

The statement required by this subsection need not be long or detailed in order to serve its underlying purpose. On the contrary, the court will accept a simple list of issues addressed in the brief but not certified for review by the district court, although the appellant is also permitted to present a more extended discussion. The clerk may provide appellants with an explanation of the statement requirement along with a warning that failure to file an appropriate statement will result in forfeiture of all issues beyond the scope of the certificate granted by the district court.

(3) A request to grant or expand a certificate, including a brief filed pursuant to Subsection (1)(B) of this Rule or a brief and statement filed pursuant to Subsection (2)(B), shall be referred to a panel of three judges. If any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c), the certificate will issue.

NOTE: Section (3) retains our current practice of referring requests for certification to three-judge panels. While Fed. R. App. P. 22(a) may afford the court some flexibility in this matter, the use of three-judge panels is consistent with Fed. R. App. 27(c), which provides that a single judge “may not dismiss or otherwise determine an appeal or other proceeding.”

The authority for a single judge to issue a certificate derives from § 2253. See 28 U.S.C. § 2253(c)(1) (providing that certain appeals may not proceed “[u]nless a circuit justice or judge issues a certificate of appealability”).

(4) In considering a request to grant or expand a certificate, including a brief filed pursuant to Subsection (1)(B) of this Rule or a brief and statement filed pursuant to Subsection (2)(B), the panel or any judge of the panel may request additional submissions from either party.

NOTE: This section allows the panel to either rule on a certificate based on the materials already received or seek additional information from the parties. Although the proposed rule does not limit panel discretion, it is likely that panels will seek additional submissions in relatively few cases and will instead issue (or expand) a certificate if the appellant has made a sufficient showing to justify further inquiry.

(5) Notwithstanding any other statement within this Rule, whenever the court appoints counsel for a pro se appellant, counsel shall have an opportunity to file a brief on

the merits addressing all issues as to which the district court or this court has granted a certificate, unless the court directs otherwise.

NOTE: This section reflects our current practice of ordering a second round of briefing whenever the court appoints counsel in a pro se case. This section will prevent any inference that the new rule has either altered that practice or reduced the discretion of the court to follow a different procedure in a particular case.

IT IS SO ORDERED.

FOR THE COURT:

/s/ William W. Wilkins

William W. Wilkins
Chief Judge

Dated: May 9, 2003